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FEDERAL ROOM

November 28, 1997

Office of the Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: Proposed Rulemaking: Preemption of State and Local Zoning and Land Use
Restrictions on the Siting, Placement and Construction of Broadcast
Transmission Facilities, MM Docket No. 97-182

Dear Secretary:

Enclosed for filing in the above-referenced proceeding are the original plus nine
copies of the Reply Comments of the New Mexico Attorney General. Also enclosed is an
additional copy of the Reply Comments to be date-stamped and returned in the enclosed
self-addressed stamped envelope. Thank you very much for your assistance.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Alletta Belin".

ALLETTA BELIN
Assistant Attorney General

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
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Preemption of State and Local)
Zoning and Land Use Restrictions)
On the Siting, Placement and)
Construction of Broadcast)
Station Transmission Facilities)

MM Docket No. 97-182

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REPLY COMMENTS OF THE NEW MEXICO ATTORNEY GENERAL

Introduction and Summary¹

The proposed rule is an unprecedented and sweeping usurpation of state and local police powers. It is unauthorized by Congress and a violation of law. It would anoint the Federal Communications Commission ("the Commission," "the FCC") as a new federal zoning and land use commission for all broadcast transmission facilities around the country. On behalf of the State of New Mexico, the New Mexico Attorney General urges the Commission not to adopt the proposed rule and not to adopt any preemption rule for siting of broadcast transmission facilities.

I. Interests of the New Mexico Attorney General In This Rulemaking

The New Mexico Attorney General is mandated to "appear before . . . federal . . . regulatory officers, agencies and bodies, to represent and to be heard on behalf of the state when, in his judgment, the public interest of the state requires such action . . ."

¹ The New Mexico Attorney General only recently became aware of the above-referenced Notice of Proposed Rulemaking. As a result, this office submits only Reply Comments in the proceeding.

NMSA 1978, Section 8-5-2 (1994 Repl. Pamp.). Certainly, the Commission's proposal to preempt state, county, and municipal authority over siting, placement and construction of broadcast towers and other facilities presents a grave threat to New Mexico, all of its political subdivisions, and its citizens. The proposed rulemaking would be an unprecedented federal invasion of the vital police powers of state and local governing authorities. If adopted, the proposed rule would prevent New Mexico and its local governments from executing their normal governmental functions in the manner necessary to best protect the public health, safety and welfare of the citizens of this state.

In New Mexico, authority over land use and zoning lies with county and city governments. NMSA 1978, Section 3-21-1 et seq. (1995 Repl. Pamp.). There is no statewide land use or environmental review statute. The State's statutory scheme recognizes that land use and zoning matters are essentially local concerns that are best addressed at the local level. State law delegates land use and zoning authority to city and county governments, and provides for judicial review of those local decisions by way of appeal to state district court. NMSA 1978, Section 3-21-9 (1995 Repl. Pamp.). As part of their general land use and zoning authority, cities and counties have the power to adopt building, fire, terrain management, environmental, historic district, and other appropriate codes and permit requirements.

The extent of land use authority exercised by cities and counties in the state varies widely, reflecting the enormous range of our communities, from the city of Albuquerque, with its population of about 500,000 people, to some rural counties which are larger than several New England states, but which have populations in the range of 1,000-3,000 people. In addition to county and city governments, there are 23 Indian tribes and

pueblos within the state, some of which are located directly adjacent to the state's major population centers and others of which are in very rural areas of New Mexico.

The impacts of the Commission's proposed rule upon these political entities and their citizens would potentially be devastating. A primary concern is not only the potential harm to communities' design and aesthetics, but also the resulting economic impacts. New Mexico's beautiful and diverse landscape supports much of its economic base by way of tourism, outdoor recreation, numerous arts-based communities, and many related industries. All of these activities depend in large part upon the aesthetics of the state. In other words, the natural beauty and the economy of New Mexico are strongly linked. The adverse economic impacts of, for example, constructing a 1,000-2,000 foot broadcast tower in the downtown Historic District of Santa Fe would be unmeasurable but enormous.

Other concerns relate to environmental, cultural, and other matters of concern to local communities but presumably not of significance to the Commission. Assuming that broadcast facilities are generally constructed in high elevations, such locations are the watersheds of our urban areas and often the source of their drinking water. Even slight alterations of the land can harm those watersheds, causing silt and pollution to run downstream. Permitting conditions can often anticipate and solve such problems in advance of facility construction. Unless local authorities are permitted to conduct their environmental reviews, however, such problems would go unaddressed.

There are cultural concerns as well. Many of the peaks and other high locations near urban areas have great spiritual and cultural significance to pueblos and other Indian tribes located in the vicinity. Recently, for example, when a Ski Company proposed to

expand its downhill Ski Area in the mountains east of Santa Fe, a number of the nearby pueblos protested the expansion on the grounds that it would intrude both physically and spiritually on sites of great significance to them. Under the FCC's proposed rule, there would be no local forum to hear and address such concerns. In a similar vein, if a proposed facility were to pose a problem for the functioning of an acequia,² a traditional institution for water supply that is a critical part of the history and culture of this state, the proposed rulemaking would ensure no deference or accommodation of such local customs and concerns.

II. The Proposed Rule and Its Effects

The Commission's proposed rule has three major components: mandatory deadlines, preemption of state and local authority over broadcast transmission facilities, and ultimate decisionmaking authority with the FCC.

A. Deadlines

First, the rule would impose very short mandatory deadlines (21-45 days) for final action by local and state authorities. There is no provision for waivers or exemptions from these deadlines under any circumstances. Any delay beyond the deadline results in automatic approval of the project.

These deadlines pose multiple problems. First, even where delays were the result of actions by the proponent, such as failure to provide the information required by the

² Acequias are community irrigation ditches in New Mexico. Pueblo Indians used acequias, as did the Spanish settlers who came to the area in the sixteenth and seventeenth century. In many rural parts of the State, acequias are at the heart of the community, as they not only provide the necessary water to each inhabitant, but they are a communally maintained and governed network through the community. Under New Mexico state law,

local government in order to complete its review, still local governmental review would be bypassed and the project approved. Under this mechanism, therefore, companies desiring to build broadcast facilities could, if they wished, evade local and state government zoning and review simply by creating delays.

Such deadlines would also eliminate any incentives for negotiation and compromise to address and resolve problems created by a proposed facility. Given the fact that the deck would be stacked entirely in the applicant's favor, there would be no incentive for the applicant to address the community's concerns and work with local government decisionmakers. Nor would the deadlines allow sufficient time for a local or state reviewing entity to review the details of a proposal and suggest ways to deal with any problems. Public involvement, a critical component of local land use decisionmaking, would be all but eliminated due to the short time period allowed for public notice and comment.

In addition, the deadlines essentially eliminate any opportunity for administrative appeal. Thus, where a city or county ordinance provides for initial decisionmaking by an agency or commission, with review to the city or county lawmakers, such a scheme would be outlawed by this rule as applied to broadcast transmission facilities.³

acequias are political subdivisions. N. M. Att'y Gen. Op. No. 63-112 (1963); N. M. Att'y Gen. Op. No. 70-47 (1970).

³ The Commission inquires about the possibility of using expedited procedures to comply with the proposed deadlines. While in theory some codes might be able to incorporate a "fast-track" procedure of some sort, the deadlines proposed in the rule contemplate elimination of procedures rather than expedition. Any state or local permitting process will require submission of a complete application, public notice, public comment and hearing, and an administrative appeal. All of these things take time, and even the most minimal set of such procedures will take more time than provided in the proposed rule. As a practical matter, for noncontroversial proposals, the time periods

B. Preemption of State and Local Review Authority

The proposed rule purports to allow for state and local government review of proposed broadcast facilities under most circumstances. A close review of the rule, however, reveals the contrary: for any controversial proposal, state and local government review would be preempted.

The rule would expressly preempt state and local action on the basis of effects of radio frequency emissions, interference effects, and lighting, painting and marking requirements. In addition, any law or rule that “impairs the ability of” applicants to build or modify broadcast facilities, is preempted unless the state or local authority demonstrates that the law or rule is reasonable in relation to a non-preempted clearly defined and expressly stated health or safety objective, and certain specified federal broadcast interests. Without admitting it, this provision is tantamount to a complete preemption of state and local authority over controversial proposed broadcast facilities. Any rule or law will be seen as an “impairment” if it results in significant conditions, alterations, or denial. The first criterion will rarely be met since most health and safety issues would be preempted. The second criterion is so vague as to leave total discretion with the Commission, which is the final arbiter in such disputes.

In sum, while this preemption provision pretends to provide for balancing of state and local interests in health, safety and welfare of the public against federal broadcast interests, in fact the scales are locked in favor of the latter. What this means is that an operator could come to Albuquerque, for example, design a huge tower in the

will not be a problem and the entire rule will be all but irrelevant. But for controversial proposals, the ones most important to a community, the rule would essentially eliminate

Albuquerque Old Town Historic District notwithstanding other superior locations for such a tower, and bar the Albuquerque City Council from having any say in the matter. Assuming that the City Council's concerns were based on economics, public welfare, and aesthetics, rather than non-preempted health and safety grounds, the City Council would be bypassed and the tower built. The same scenario would unfold for virtually any controversial proposal where a state or local authority wished to amend or deny a broadcast facility construction proposal due to its impacts on the community.

C. FCC Review Authority

The proposed rulemaking renders the FCC the ultimate federal zoning, land use, and environmental review board throughout the country. The Commission would be the arbiter wherever there was a dispute between a state or local government and an applicant. In effect, the Commission would completely usurp state and local police power authority in relation to construction and modification of broadcast towers and related buildings and facilities. Given the Commission's obvious lack of expertise in zoning, land use, environmental issues, building and fire codes, and other matters of local concern, the proposal is patently flawed.

II. The Commission Has No Authority, Implied or Express, To Preempt State and Local Authority Over Placement And Construction Of Broadcast Facilities.

Numerous other commenters, including the Vermont Office of the Attorney General and the Massachusetts Attorney General among others, have provided the Commission with analyses showing that the Commission lacks the legal authority to promulgate the proposed rule. The New Mexico Attorney General endorses those legal

state and local authority.

analyses. The Commission has no authority to promulgate this rule with its sweeping preemption of state and local police power authority because the Commission has neither express nor implied authority to do so from Congress. In neither the Communications Act of 1934 nor the Telecommunications Act of 1996 did Congress evidence any intention to preempt the exercise of such fundamental police powers by state and local governments in relation to broadcast transmission facilities.

The preemption contained in the proposed rule is extremely broad in every dimension. First, it applies to a much larger category of facilities than could be justified by the accompanying rationale. While the rationale relates to the need for speedy conversion to DTV, the rule is not limited to construction of DTV facilities, but instead would apply to all “broadcast transmission facilities.” Second, its deadlines are unbelievably short, with no allowance under any circumstances for extension or modification, even if it were clear that more time could be taken without causing exceedances of the deadlines in the Commission’s Fifth Report and Order, or that an applicant were deliberately undermining and bypassing state and local requirements.

Third, the actual preemption provisions themselves, while disguised under the rubric of balancing state and local versus federal interests, are actually a carte blanche for an applicant to evade all state and local requirements. The proposed rule leaves state and local governments with no meaningful review authority over proposed facilities that pose the greatest dangers to their communities and that invoke the greatest public controversy. The rule gives applicants all of the benefits; local and state governments get all of the burdens.

There is no need for the Commission to effect such a drastic usurpation of state and local police powers. State and local governments are not going to try to delay these projects; it is in their interest to have DTV. Rather, their interest will be only in ensuring that DTV enters their community in a reasonable fashion, without unnecessary or inappropriate adverse impacts on residents and their property. Ironically, the proposed rule would in all likelihood create more controversy than would occur without the rule, because it would eliminate all incentives for an applicant to work with local authorities to prepare an acceptable project proposal.


Conclusion

On behalf of the State of New Mexico, the New Mexico Attorney General recommends that the Commission terminate this proceeding and adopt no preemption rule for DTV or other broadcast transmission facilities.

DATED: November 28, 1997

Respectfully submitted,

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